ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
WENDELL L. GRIFFEN, JUDGE

DIVISION III

CACR06-934

April 25, 2007

THOMAS H. DAVIS
APPELLANT

AN APPEAL FROM SEBASTIAN COUNTY CIRCUIT COURT
[MC2005-126]

V.

HON. JAMES R. MARSCHEWSKI, JUDGE

STATE OF ARKANSAS
APPELLEE

AFFIRMED

On January 26, 2006, a Sebastian County jury found Thomas H. Davis guilty of loitering, a class C misdemeanor, for which he received a fifteen-day term in the county jail and a $100 fine. He challenges the sufficiency of the evidence, contending that the State failed to prove that he took any overt step toward any deviate sexual activity. We affirm.

In response to several citizen complaints about public sexual activities, Fort Smith police set up an undercover operation aimed at deterring such conduct at the Fort Smith Park. While patrolling the park on the afternoon of May 24, 2005, Detective Paul Smith saw appellant sitting in a truck. Appellant turned on his reverse lights and then turned them off, which according to Smith was a common signal used to indicate that one wanted to meet another individual. Appellant made eye contact with Smith as he (Smith) drove by.

Appellant parked two or three spaces from appellant's truck, exited his vehicle, and sat at a park bench. Minutes later, appellant exited his truck and approached Smith. Smith had what appeared to be a large bulge in his pants.

When appellant reached Smith, the two began talking in nonspecific terms about the weather, geese in the park, bathers on the river, and other "normal banter." The conversation then took a turn, as noted by Smith's testimony:

Q: Did the conversation ever change to anything different?

A: The tone of the conversation – in other words his tone – changed from that normal non-specific general conversation when he asked me, "So what are you doing out here," or "What are you out here for."

Q: And what was your response?

A: It was a little hesitant, and a little nervous.

Q: Okay.

A: So I told him, "I'm just out here goofing around. What did you have in mind?" And his response was, "I'm just trying to get a nut off. What do you do?"

Q: And what did you take that to mean?

A: Well, I took it to mean that he was trying to get sexual gratification, get a nut off.

Q: Well, what did you say to him then?

A: Well, I wanted to get more specific, so I asked him, "Well, I'm not sure whether you are a pitcher or a catcher."

Q: And, for the jury's benefit, that's not a baseball term?

A: No, that's inquiring whether he wants to receive oral sex, and whether he enjoys giving oral sex.

Q: Okay. And what was his response to that?

A: And Mr. Davis responded, "Well, I'm kind of selfish. I like to get blow jobs, but not give them." So I told him, well, I'm just the man for him, and Mr. Davis said, "Now I want to get a nut off, and some guys out here don't like to swallow. Are you okay with that?"

Q: Okay.

A: And before I could respond, Mr. Davis stated, "I just wanted to make sure you swallowed."

Q: And what did you say?

A: So I told him I was okay with that, and Mr. Davis then asked me, "Do you think it's safe here, or do you want to go to the other side of the park," referring to a brushy area on the east end of the park where individuals go off to be by themselves and engage in activity.

Q: What did you tell him?

A: I told him that I thought his window tinting on his truck was dark enough, and he said that was okay. So I told Mr. Davis, "Go back to your truck and get ready for me, and I'll be there in a minute." This was to give me time. I gave a visual signal to the arrest team to come in and –

Q: Do you remember what that signal was that day?

A: At that point it was just a sign like this. Usually I wear a hat, and I take the hat off. But I wasn't wearing a hat that day; I was in a surveillance mode. So I just made a visual signal like this, and the other officers came in. As soon as I saw that they were coming, I was comfortable that there were enough officers there. I pulled out my badge and I identified myself and explained to Mr. Davis that he was under arrest.

. . . .

Q: Did you ever inform him of what he was charged with?

A: Yes. We would meet at a staging area which is about a block, block and a half away, and I went up there I explained the charge to him. And at that point Mr. Davis asked, "Does it matter if I was only going to receive it and not give it," referring to oral sex. I explained to him this statute that it wasn't specific

> as to whether the individual was either receiving gratification or giving gratification, and then Mr. Davis asked, "Well, does it matter that you waved at me and I thought that you were one of the guys." And I again advised him, "No, that doesn't matter."

At the close of the State's case, appellant moved for directed verdict, arguing that the State failed to present sufficient evidence that he intended to engage in deviant sexual activity. He further argued that there was no evidence that anyone removed any clothing or that he attempted to flee or conceal his identity. The court denied his motion. Appellant then presented his case. He explained that he approached Smith because Smith was waving at him. Appellant admitted that he struck a conversation with Smith, but that he was joking when the two were talking about oral sex. He denied that he was homosexual; however, he testified that he has joked with homosexuals on several occasions.

At the close of the evidence, appellant renewed his motion for directed verdict which the trial court denied the motion. The jury found appellant guilty of loitering and sentenced him to fifteen days in the county jail and a $100 fine.

The test for determining the sufficiency of the evidence in a criminal appeal following a conviction is whether the verdict is supported by substantial evidence, direct or circumstantial, viewing the evidence in the light most favorable to the State. *Baughman v. State*, 353 Ark. 1, 110 S.W.3d 740 (2003). Substantial evidence is evidence forceful enough to compel a conclusion one way or the other beyond suspicion or conjecture. *Id.* Only evidence supporting the verdict will be considered. *Id.* Circumstantial evidence provides the basis to support a conviction if it is consistent with the defendant's guilt and inconsistent with any other reasonable conclusion. *Von Holt v. State*, 85 Ark. App. 308, 151 S.W.3d 1 (2004).

Whether the evidence does so is a question for the jury. *Id.*

A person commits the offense of loitering if he lingers or remains in a public place for the purpose of engaging or soliciting another person to engage in prostitution or deviate sexual activity. Ark. Code Ann. § 5-71-213(a)(5) (Repl. 2005). When considering whether a person is loitering, one may consider whether the alleged loiterer takes flight upon the appearance of a law enforcement officer, refuses to identify himself, or manifestly endeavors to conceal himself or any object. Ark. Code Ann. § 5-71-213(b).

Appellant argues that none of these factors applied to his case. He further contends that the evidence shows that no one removed any clothing and that he was just having fun with the officer, whom he thought was homosexual. However, the evidence shows that appellant engaged in a conversation regarding intent to engage in sexual activity with Smith. The jury may resolve questions of conflicting testimony and inconsistent evidence and may choose to believe the State's account of the facts rather than the defendant's. *Mackool v. State*, 365 Ark. 416, — S.W.3d — (2006). Further, the jury is not required to lay aside its common sense in evaluating the ordinary affairs of life, and it may infer a defendant's guilt from improbable explanations of incriminating conduct. *Id.* The evidence here was such that a reasonable jury could find that appellant was soliciting Smith for oral sex and/or that appellant had committed acts demonstrating that he intended to engage in oral sex in a public park.

Affirmed.

HART and BAKER, JJ., agree.